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No. 944

IN THE

Supreme Court of the United States

October Term, 1944.

LESLIE BEN DRAKE, ET AL., *Petitioners,*

VERSUS

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

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October Term, 1944

LESLIE BEN DRAKE, ET AL., *Petitioners,*

VERSUS

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable The Supreme Court of the United States:

Come now Leslie Ben Drake and Gilbert Allen Sanderson, hereinafter called petitioners, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully show:

STATEMENT OF THE CASE

On the 26th day of January, 1944, an indictment was returned to the District Court of the United States, for the Northern District of Texas, charging petitioners, J. R. Clark and Floyd Edward Oldham, with having on or about January 12, 1944, entered into a conspiracy to violate what is commonly known as the War Explosives Act as defined and announced in Sections 121 to 141, Title 50, of the United States Code Annotated, and to have done certain overt acts in furtherance of said conspiracy.

On the 29th day of January, 1944, the case was called for trial and each of the defendants was convicted and sentenced to be confined in a United States penitentiary to be selected by the Attorney General for a term of two years.

Leslie Ben Drake and Gilbert Allen Sanderson seasonably appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment of the lower court was affirmed by said Circuit Court of Appeals on December 9, 1944 (Tr. 39). They filed their petition for a rehearing (Tr. 43), which was on the 13th day of January, 1945, overruled without a written opinion.

QUESTION PRESENTED

Whether the Supreme Court of the United States will note and correct obvious and fundamental errors of such

a nature as might reflect upon the public representation of justice, materially affecting the rights of petitioners, where no exceptions or objections were made and had at the trial, and where they were not brought forth by proper assignments of error.

STATEMENT AS TO THE JURISDICTION

This case originated in the District Court of the United States, for the Northern District of Texas, at Dallas. Upon the conviction of petitioners and sentence of two years imposed upon each of them, they appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said court affirmed the judgment and sentence of the lower court. They filed their petition for rehearing, which was overruled by said court.

Jurisdiction of this case is conferred upon the Supreme Court of the United States by Section 347-a, U. S. C. A., Title 28, and sanctioned by subsection 3 of paragraph 5 (b) of Rule 38, Court Rules of the Supreme Court of the United States.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The errors here assigned are obvious and fundamental, unquestionably affecting the rights of petitioners, and are of such nature as might likely reflect upon public justice, and the action of the United States Circuit Court

of Appeals for the Fifth Circuit in failing and refusing to take cognizance of such errors, not properly assigned, was in conflict with the rule of well established decisions of this Honorable Court, and particularly in conflict with:

Brookfield v. United States, 272 U. S. 448, 450, 71 Law Ed. 345;

N. Y. Cent. R. R. Co. Case, 279 U. S. 308-310, 73 Law Ed. 706;

United States v. Atkinson, 297 U. S. 157, 80 Law Ed. 555;

and the well established line of dicisions of the Circuit Courts of Appeals, and particularly in conflict with:

Benson v. United States, 112 F. (2) 422;

Genatos v. United States, 104 F. (2) 929;

Hayes v. United States, 112 F. (2) 676;

Meadows v. United States, 82 F. (2) 881;

Thomas v. D. C., 90 F. (2) 424.

WHEREFORE, your petitioners respectfully pray that writ of certiorari issue to the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered

and entitled on its docket: No. 10950, Leslie Ben Drake, et al. v. United States of America, and that the judgment of the Circuit Court of Appeals and that of the trial court be reversed and the cause remanded, and for such other orders as may be by this Honorable Court deemed just and proper.

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No.———

IN THE

Supreme Court of the United States

October Term, 1944

LESLIE BEN DRAKE, ET AL., *Petitioners,*

versus

UNITED STATES OF AMERICA, *Respondent*

SUPPORTING BRIEF

To the Honorable The Supreme Court of the United States:

In support of their petition for writ of certiorari, petitioners respectfully show to this Honorable Court:

1

OPINIONS OF THE COURT BELOW

There was no opinion by the trial court, but the opinion of the United States Circuit Court of Appeals for the Fifth Circuit was handed down on December 9, 1944 (Tr. 39), and the petition for rehearing was overruled without written opinion (Tr. 46).

JURISDICTION OF THE COURT

This court has jurisdiction of this cause under Title 28, U. S. C. A., Section 347-a, and under subsection 3 of paragraph 5 of Rule 38 of the Court Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked upon the following grounds: The errors hereinafter assigned are of such obvious nature calculated to reflect upon public justice and to materially affect the rights of the petitioners, that the United States Circuit Court of Appeals had no discretion other than to note and correct same, and in refusing to do so decided a point of law in conflict with the well established rule of decisions of this Honorable Court, and particularly in conflict with:

Brookfield v. United States, 272 U. S. 448, 450, 71 Law Ed. 345;

N. Y. Cent. R. R. Co. Case, 279 U. S. 308-310, 73 Law Ed. 706;

United States v. Atkinson, 297 U. S. 157, 80 Law Ed. 555;

Benson v. United States, 112 F. (2) 422;

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On the 29th day of January, 1944, the case was called for trial and each of the defendants was convicted and sentenced to be confined in a United States penitentiary to be selected by the Attorney General for a term of two years.

Leslie Ben Drake and Gilbert Allen Sanderson seasonably appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment of the lower court was affirmed by said Circuit Court of Appeals on December 9, 1944 (Tr. 39). They filed their petition for a rehearing (Tr. 43), which was on the 13th day of January, 1945, overruled without a written opinion.

ASSIGNMENTS OF ERROR

1

Since this was a conspiracy case only, and the acts of one could be considered by the jury as the acts of all while

the conspiracy was in existence, it was error of such obvious nature as to challenge the notice and cause the correction of this Honorable Court, to have allowed the witness, Luther Wayne Maddox, to testify, in the presence and hearing of the jury, that on the night of January 12, 1944, he and his partner saw J. R. Clark, one of the petitioners, standing on the corner of Ervay and Bryan Streets, Dallas, Texas, near the Post Office, and they "thought there was something wrong with the way he was acting" (Tr. 6), for the reason that such testimony constituted the opinion and conclusion of the witness, was highly prejudicial, and was calculated to inflame the minds of the jury against petitioners.

2

It was obvious error, materially affecting the rights of petitioners, for the trial court to allow the witness, Luther Wayne Maddox, to testify that he knew that his (Leslie Ben Drake's) name was not J. C. Wilson, as he had told them he was, and that they "searched them at the jail office, but had first searched them here to see that they didn't have any firearms or knives," for the reason that this testimony was an insinuation that petitioner, Leslie Ben Drake, was a dangerous desperado, accustomed to carrying guns and knives, and was, therefore, prejudicial and calculated to inflame the minds of the jury against him (Tr. pp. 6-7).

3

It was obvious error, materially affecting the rights of petitioners, for the court to permit the witness, Luther Wayne Maddox, to testify that when they reached the jail they searched the car and found a kit of tools sitting on the floor of the car, and that "they looked like burglar's tools, being tools that would open any kind of a strong box, that they could be used in that particular line of work," for the reason that this was an opinion and conclusion of the witness, strongly calculated to lead the jury to believe they were thieves, burglars, and safe blowers, and was highly improper, inflammatory, and calculated to so prejudice the minds of the jury that no kind of rebuttal testimony would erase, and which could not be erased even by an instruction of the court not to regard it for any purpose, which was not done (Tr. p. 7).

4

It was obvious error, materially affecting the rights of petitioners, for the court to permit the witness, Ewing Jones, to testify "That on the occasion of the arrest of the defendants there were turned over to him the burglary tools and explosives" (Tr. p. 10), for the reason that whether or not they were burglary tools was an opinion and conclusion of the witness, was highly inflammatory, prejudicial, and calculated to so inflame the minds of the jury to such an extent that they could not give petitioners a fair trial under any circumstances.

5

It was obvious error for the court to permit the witness, Joe S. Baldwin, to testify that "the amount of dynamite he saw would tear counsel table he saw in the courtroom all to pieces and blow it all over the courtroom; that it was sufficient to open a safe or strongbox" (Tr. p. 11), for the reason that he had been called, evidently, as an expert to testify as to whether or not what petitioners had in their possession was such explosives as were denounced by the statute, and not to give an example or demonstration, and the testimony, evidently elicited by questions of government counsel, that it was sufficient "to open a safe or strongbox," was highly prejudicial, inflammatory and calculated to so prejudice the minds of the jury as to render it impossible for the jury to give them a fair and impartial trial.

6

It was obvious error for the court to permit the witness, H. L. Thompson, to testify that he was present when the examination was made of the explosives, and "the expert told him they were satisfied; that he was also satisfied by the demonstration from what he knows of explosives" (Tr. p. 11), for the reason that this was his own opinion and conclusion, hearsay, highly improper way to establish the fact they had explosives, if they did; that Thompson had not qualified as an expert, all of which was prejudicial, inflammatory, and highly calculated to inflame the

minds of the jury to such an extent as to render it impossible for them to give petitioners a fair trial.

7

It was obvious error, calculated to materially affect the rights of the petitioners, for the court to charge the jury, "* * * and you will not convict them by reason of the fact that they may have had burglary tools. You can't indict a man for one offense and convict him for another, and you will not consider the fact that they had burglary tools against them. That was permitted to come into the case to show the surrounding circumstances and attitude of the parties—you can consider it as throwing light upon their probable intention" (Tr. 19-20), for the reason that this charge amounts to a finding of the court that the defendants actually had burglary tools in their possession, and if they did, this fact was not a material issue in the case, all of which said charge amounted to a finding of the court that they had burglary tools and that if they did, this was a material issue in the case, whereas, in truth and in fact, it was immaterial and irrelevant, if they did so have such burglary tools, and further, was prejudicial, inflammatory and calculated to so inflame the minds of the jury against petitioners that it would be impossible for them to receive a fair and impartial trial at the hands of the jury.

8

It was obvious and fundamental error for the trial court to fail to charge the jury on circumstantial evidence (Tr. pp. 12-21).

QUESTION PRESENTED

Whether the Supreme Court of the United States will note and correct obvious and fundamental errors of such a nature as might reflect upon the public representation of justice, materially affecting the rights of petitioners, where no exceptions or objections were made and had at the trial, and where they were not brought forth by proper assignments of error.

BRIEF OF THE ARGUMENT

Counsel for petitioners are so firmly convinced that all eight of their assignments of error present such harmful and prejudicial matters; that the errors complained of are so fundamental and obvious; that no amount of instructions from the court to disregard things in them complained of could remove their harmful effects, that they deem it only necessary to brief the question of whether or not this Honorable Court will correct them in the present state of the record. Counsel are unable to conceive any kind or character of reason why they were not challenged by the counsel who tried the case, but we do believe that this Honorable Court will not let petitioners

go to the penitentiary simply because they did not have a counsel who could or would protect their rights. Further, we must suppose that all the testimony in the record concerning the possession of burglary tools by petitioners must have been elicited by questions of government counsel, and if so, we further urge that the harmful effects of this procedure and answers of witnesses could not have been removed, if objected to at the time of making, and the trial court had then and there instructed the jury not to consider it.

We further urge that the instructions given the jury, after the trial was over, and after the jury had had the benefit of the burglary tools testimony throughout the trial, to limit the testimony concerning them as the court did, only served to emphasize this highly prejudicial and improper testimony, for the court, in effect, charged the jury that petitioners did actually have burglary tools in their possession, and that it was an issue in the case to show motive and intent.

Petitioners, with others, were charged simply of having conspired to possess explosives when the United States was at war with Germany and Japan, without having first applied to the Director of the Bureau of Mines for a license to possess such explosives. We contend and believe, that under the law, it is quite immaterial for what purpose they possessed it. It is our theory of the law that had they possessed it for the purpose

of blasting rocks for a foundation to build a church, the law would have been violated had they not have had the license required. Such violation itself is a misdemeanor, punishable by a fine of not more than $5,000.00, or imprisonment of not more than one year, or both. (U. S. C. A., Title 50, Sec. 141.) The United States District Attorney saw fit to prosecute them under the charge of conspiracy with the higher bracket of punishment, although there was only one isolated transaction, which is a matter of his own policy and with which we are not concerned, except in so far as this case is concerned.

The only comprehensive description of what tools petitioners actually had, which was quite immaterial to any issue involved in the case, was given by the witness, Randolph Darnell. He testified (Tr. p. 9) that there was found in the car "several punches and a tool with a chisel on one end and a hammer on the other, two or three of these, a brace and a bit and a sledge hammer weighing approximately three pounds". These tools could have been used for any legitimate purpose. Even if the tools had any purpose at all in the case, and, as above stated, whether petitioners did or did not have them was highly irrelevant, and to repeatedly allow witnesses to call them "burglary tools" and to charge the jury to disregard the fact that the defendants "had burglary tools" could only serve to prejudice the minds of the jury against petitioners.

That, under circumstances which we have here, higher courts will take notice of and correct errors affecting the

rights of litigants without objections and exceptions having been taken or assigned as error is provided for by the rules of this Honorable Court, and established by the overwhelming weight of authorities of long and unbroken standing. Where there has been a conflict between justice and technicalities, justice has always won. We think we have that kind of a case.

United States vs. Atkinson, 297 U. S., 157, 80 L. Ed., 555;

New York Cent. Ry. Co. Case, 279 U. S. 308-310; 73 L. Ed. 706;

Brookfield vs. U. S., 272 U. S., 448, 450, 71 L. Ed. 345, 346;

Annotation of this Point, 14 L. Ed. 643;

Hayes vs. U. S., 112 F. (2) 676;

Benson vs. U. S., 112 F. (2) 422;

McAfee vs. U. S., 105 F. (2) 21;

Harmon vs. U. S., 99 F. (2) 933;

Meadows vs. U. S., 82 F. (2) 881;

Thomas vs. D. C., 90 F. (2) 424;

Genatos vs. U. S., 104 F. (2) 929.

The above cases hold, in effect, that especially in criminal cases, involving the life and liberty of defendants, where the error is obvious and calculated to seriously af-

fect the rights of litigants, it is not only the privilege but the duty of appellate courts to notice and correct such errors. We urge earnestly that we come within that rule.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Honorable The United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify to this court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket: No. 10950, Leslie Ben Drake et al. v. United States of America, and that the judgment of the Circuit Court of Appeals and that of the trial court be reversed and the cause remanded, and for such other orders as may be by this Honorable Court deemed just and proper.

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No. 944

In the Supreme Court of the United States

OCTOBER TERM, 1944

LESLIE BEN DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1944

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LESLIE BEN DRAKE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 36–37) is reported at 145 F. 2d 825, *sub nom. Sanderson et al.* v. *United States.*

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1944 (R. 37). A petition for rehearing was denied January 13, 1945 (R. 42). The petition for a writ of certiorari was filed February 12, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the circuit court of appeals was justified in affirming petitioners' convictions as against their contention that plain error had been committed at their trial.

STATUTES INVOLVED

The Federal Explosives Act (Act of October 6, 1917, c. 83, 40 Stat. 385, as amended by the Act of December 26, 1941, c. 633, 55 Stat. 863–868, 50 U. S. C., Supp. I, 121–143) provides, in part, as follows:

> SEC. 2 * * *
>
> Except as provided in section 4,[1] no person shall possess, purchase, accept, receive, acquire, or use explosives or ingredients unless such person is licensed under this Act.
>
> SEC. 6 [This section provides for the issuance of licenses by the Director of the Bureau of Mines]
>
> * * * * *
>
> SEC. 9. Unless the explosives and ingredients are to be purchased or accepted pursuant to section 4, any person desiring to manufacture, distribute, store, sell, issue, give, possess, purchase, accept, receive, ac-

[1] Section 4 permits licensed employees to sell or issue explosives to subordinate employees.

quire, or use explosives or ingredients shall make application for a license under this Act. * * *

SEC. 19. Any person violating any of the provisions of this Act or any rules or regulations made thereunder shall be guilty of a misdemeanor and shall be punished by a fine of not more than $5,000 or by imprisonment of not more than one year, or by both such fine and imprisonment.

SEC. 20. The provisions of this Act and the regulations issued hereunder shall become operative only upon a declaration of war or of the existence of a state of war by the Congress * * * and shall remain operative until the termination of the war * * *.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On January 26, 1944, petitioners (Leslie Ben Drake and Gilbert Allen Sanderson) and J. R. Clark and Floyd Edward Oldham were indicted

in one count in the District Court for the Northern District of Texas for conspiring to violate 50 U. S. C. A. 121–141, the Federal Explosives Act, *supra*[2] (R. 1–3). The indictment charged that the defendants on January 12, 1944, conspired, at a time when the United States was at war, to possess explosives, fuses, and detonators without having applied to the Director of the Bureau of Mines for a license to possess them (R. 2). Two overt acts were alleged to have been committed by the defendants pursuant to the conspiracy, the first of which was that they rode in an automobile near the post office in Dallas, Texas, at 1:15 a. m. on January 12, 1944, and the second, that on the same date they traveled in an automobile "with a quantity of explosives, including dynamite, an unexploded dynamite cap, and a fuse, together with burglar tools and implements used in the opening, cracking and blasting of safes, and other strong boxes" (R. 3). Petitioner Drake's attorney was appointed to represent petitioner Sander-

[2] The indictment, apparently through inadvertence, cited the sections as they appear in the 1928 edition of Title 50 of United States Code Annotated. The amending act of December 26, 1941, revised the original act of 1917 and redistributed the subject matter into differently numbered sections, with the result that the sections as they are incorporated in the United States Code, Supp. I, are likewise numbered differently than they were in the earlier editions both of the Code and the Annotated Code. However, the substance of the sections here involved was not changed by the amending Act.

son and the other defendants upon their request for appointment of counsel, after it appeared to the satisfaction of the court that there was no conflict of interest among the several defendants (R. 5). After a jury trial, each of the defendants was convicted and sentenced to imprisonment for a term of two years (R. 4, 21–22, 27). On appeal by petitioners to the Circuit Court of Appeals for the Fifth Circuit,[3] the judgments of conviction were affirmed (R. 36–37).

Although the sufficiency of the evidence is not directly involved, we present a summary thereof in order that the Court may be aided in appraising the question presented by the petition:

Maddox, a Dallas police officer, testified that while he was on patrol on January 12, 1944, at about 1:10 a. m., he noticed an automobile parked near the post office, with no one in it. He came back later and observed defendant Clark standing on the corner and he "thought there was something wrong with the way he was acting." He returned again and saw the defendants in the car. Upon questioning them, petitioner Drake said that his name was "J. C. Wilson," which Maddox knew was not true. Thereupon, he took the defendants into custody and searched them, but found no "firearms or knives." (R. 6–7.) At the jail, the car was searched, and Maddox

[3] Clark also appealed, but his appeal was dismissed upon his own motion (R. 35–36).

found a "kit of tools * * * like burglar tools * * * that would open any kind of strong-box" (R. 7). He also found dynamite in the tool kit, and in the car a dynamite cap, and in petitioner Sanderson's pocket a fuse (R. 7). On cross-examination, Maddox gave a detailed description of the "burglar tools" and testified that when the defendants were questioned, they stated that they had been on a "drinking party"; that although he could "smell whiskey," the defendants were not intoxicated (R. 7). Maddox's testimony was corroborated by a police officer who was on patrol with him (R. 9–10). The Dallas police department property custodian testified that on the occasion of the defendants' arrest the "burglary tools and explosives" were turned over to him (R. 10). An agent of the Federal Bureau of Investigation testified that upon questioning the defendants, they told him that they did not have a license for the possession of explosives; that he was present when the explosives were examined, and he was satisfied that they were explosives from his own knowledge and the "experts told him they were satisfied" (R. 11). An explosives dealer testified that he examined the explosives and that the amount he saw would "tear counsel table * * * all to pieces and blow it all over the Court room; that it was sufficient to open a safe or strong-box" (R. 10–11). There was also testimony that petitioner Drake and defendant

Oldham obtained the dynamite from a man who wanted "to give it away," and that when they obtained it, they put it in the car (R. 8–9).

Petitioner Sanderson and defendant Clark testified in their own behalf, and Maddox was also called as a witness by the defendants (R. 12–17). In substance, Sanderson disclaimed any knowledge of the fact that explosives were in the car or that the fuse which was found in his pocket was a dynamite fuse (R. 12–15). He admitted that he had previously been convicted of assault with intent to murder and of robbery (R. 15). Clark, likewise, denied any knowledge of the fact that there were explosives in the car; he admitted that he had been convicted of aggravated assault and burglary (R. 16–17). Maddox testified that the dynamite was found in the car shortly after the defendants were arrested (R. 12).

The trial court instructed the jury that the burden was upon the Government to prove the defendants' guilt beyond a reasonable doubt (R. 19); that the jury was not to consider as a basis for conviction the fact that the defendants had burglar's tools, which it permitted "to come into the case to show the surrounding circumstances and attitude of the parties—you can consider it as throwing light upon their probable intention" (R. 19–20). It also instructed as to the proof necessary to establish the conspiracy (R. 21). No ob-

jection was made by the defendants to the charge (R. 21).

ARGUMENT

Petitioners concede (Pet. 2–3, 14) that at their trial they did not object to the introduction of any of the evidence adduced by the Government or to the charge of the court. On appeal they assigned as error that the evidence was insufficient to sustain their convictions; that the explosives statute was unconstitutional; and, finally, that the summation of the prosecuting attorney was prejudicial (R. 24–26). It appears that while the case was pending on appeal, petitioner Drake employed new counsel, who filed an amended brief in his behalf (a copy of which we have obtained), contending that obvious and fundamental errors had been committed at the trial with respect to the admission of testimony and the charge of the court, which should be considered on the appeal, despite the absence of objection at the trial. Specifically, counsel contended, as they do here, that the following testimony of Maddox was erroneously admitted: that he thought there was something wrong with the way defendant Clark was acting when first observed; that he knew petitioner Drake's name was not Wilson; that he searched the defendants for firearms or explosives; and that the tools which he found in the car appeared to be burglar's tools (see pp. 5–6, *supra*). Counsel also argued that it was improper to per-

mit the police department property custodian to testify that the "burglary tools" were turned over to him, and to allow the explosives expert to testify that the dynamite found in the defendants' possession was sufficient to destroy the counsel table and to open a safe or strong box (see p. 6, *supra*). Counsel likewise urged as error the admission of the testimony of the F. B. I. agent that from the expert's examination and from his own knowledge, the material taken from the defendants was explosives. In respect of the trial court's charge, it was contended that the court's reference to "burglar's tools" was improper and that the court should have charged the jury "on circumstantial evidence" (see Pet. 14).

The circuit court of appeals held that only "where exceptional circumstances are present, such as obvious reversible error, or errors that affect the fairness, integrity, or public reputation of judicial proceedings," was it required "of its own motion to set aside the verdict of the jury for an error or errors not brought to the attention of the trial court," and that "This is not such a case" (R. 37).

Petitioners contend (Pet. 2–3, 4, 8, 14, 16–18) that the circuit court of appeals erred in failing to consider and to correct the claimed errors which counsel had called to its attention. There is no merit in this contention insofar as it rests upon the purported failure of the circuit court of ap-

peals to consider the alleged errors, for the opinion discloses that the court did pass upon them, but concluded that they were not of such a serious nature as to warrant application of the doctrine that in criminal cases the federal appellate courts will correct a plain error, even though it was not properly saved for review. *Wiborg* v. *United States*, 163 U. S. 632, 658; see also, *Clyatt* v. *United States*, 197 U. S. 207, 221–222; *Williamson* v. *United States*, 207 U. S. 425, 452–453; *Crawford* v. *United States*, 212 U. S. 183; *Weems* v. *United States*, 217 U. S. 349, 362–363; cf. *Brasfield* v. *United States*, 272 U. S. 448, 450; *United States* v. *Atkinson*, 297 U. S. 157, 160. Since the court below did consider petitioners' contentions of error, the case differs from *Hemphill* v. *United States*, 312 U. S. 657, where it appeared that the Circuit Court of Appeals for the Ninth Circuit might have entertained the view that it was without power to review plain error absent a proper reservation at the trial (see the Government's brief in the *Hemphill* case, No. 369, October Term, 1940, pp. 5–12). But the appellate court's power in this regard is discretionary (*Crawford* v. *United States*, 212 U. S. 183; *Weems* v. *United States*, 217 U. S. 349, 362), and we think that the discretion refers to the determination of whether there is such a denial of justice as to warrant disregard of procedural irregularity, and not to an unfettered option to examine an appellant's claim of error. The appellate court should inquire into

the merits of an appellant's contentions sufficiently to ascertain whether they disclose plain error. Cf. *Bailey* v. *United States*, 13 F. 2d 325 (C. C. A. 9).

It may be that had petitioners objected at their trial to the introduction of the evidence which they now contend was erroneously admitted—particularly that bearing on their possession of burglar's tools and the testimony that the quantity of dynamite found was sufficient to open a strongbox or safe—they would have secured its exclusion on the ground that it was irrelevant and prejudicial. But we submit that the circuit court of appeals was fully warranted in the exercise of sound discretion in affirming petitioners' convictions on the basis of the clear evidence adduced by the Government to prove the essential elements of the offense charged, and that there is no occasion for this Court to intercede at this stage of the case. The Federal Explosives Act, *supra*, pp. 2–3, unqualifiedly proscribes the possession of explosives during time of war without a license. Concededly, there was ample and competent evidence that petitioners did possess explosives and that they did not have any license. Also, there was sufficient evidence to prove that petitioners conspired to possess the explosives, as charged in the indictment. Under these circumstances, it cannot be said that petitioners' convictions have resulted from a denial of a fair trial.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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